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FEB 21 2007
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No. 06-1002

IN THE SUPREME COURT OF THE UNITED STATES

MANDY R., by and through her parents and guardians, Mr. and Mrs. R, et al.,

Petitioners,

vs.

BILL RITTER, Governor of the State of Colorado, et al.,

Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Does federal Medicaid law, which requires that medical assistance be furnished with reasonable promptness to all eligible individuals and may not be less in amount, duration, and scope to the medical assistance made available to similarly situated others, impose on a state an obligation to ensure that the care and assistance specified in the state's Medicaid plan is promptly furnished when the state plan provides it will furnish it with "no limitations", either privately or publicly? Or may the state discharge its federal Medicaid obligation by merely making prompt payment when presented with a charge for such care and assistance and place Medicaid eligible persons on waiting lists until services are provided?

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STATEMENT

1. Medicaid is the popular name for a joint federal and state program that pays for medical care and services for the needy. Colorado participates in Medicaid. Among many other types of services, the Colorado Medicaid program pays for residential services provided to persons with developmental disabilities ("DD"). Petitioners seek these services.

2. There are two types of residential services for persons with DD covered by the Colorado Medicaid program: Home and Community-Based Services ("HCBS") and services provided in an

intermediate care facility for the mentally retarded ("ICF/MR").

3. HCBS is not at issue in this case. Petitioners have expressly conceded that Colorado may cap the number of persons who receive HCBS. Petition at 7-8. HCBS is by far the more popular service type. At the time of trial, nearly 3,800 persons were receiving HCBS and another 733 were on a waiting list for HCBS. Pet. App. 8a.

4. There are only three ICFs/MR in Colorado. One is a privately-operated ICF/MR with 16 beds. Pet. App. 48a. Colorado operates the other two ICFs/MR, and they have a total of 70 beds. Pet. App. 48a. Thus, there are only 86 ICF/MR beds in Colorado. At the time of trial, there were 21 people on the waiting list for ICF/MR services. Pet. App. 48a-49a. Petitioner Mandy R. was offered a placement at the privately operated ICF/MR, but she turned it down because it "was just a higher level of care than she needed". Resp. App. A-4. All of the petitioners indicated that they were not interested in placement in a large institutional ICF/MR such as the ones operated by Colorado. Resp. App. A-3 to A-8.

5. No private organization has applied to operate an ICF/MR in Colorado for many years. At trial, Art Hogling, the Executive Director of a Community Centered Board that used to operate several ICFs/MR, testified that his organization ceased to do so because ICF/MR "was an older model" with "a lot of problems". Resp. App A-9.

6. Colorado has no statute or rule limiting the number of ICFs/MR[1] or the number of persons who can receive these services. Colorado will pay for ICF/MR services provided to any appropriate persons eligible for Medicaid.

7. Petitioners argue that Colorado must do more than pay for ICF/MR services. They contend Colorado must actually *provide* ICF/MR services to persons eligible for Medicaid.

ARGUMENT

The petition should be denied. The decision below is consistent with the plain meaning of the applicable statutes. There is no conflict in the lower courts on the question presented. The federal administrative agency with expertise and authority for the Medicaid program has never sought to apply the interpretation of these statutes in the manner ruged by Petitioners.

I. The decision below is consistent with the plain meaning of the applicable statutes.

Petitioners base their claims on two statutes. The first requires States to provide "medical assistance" with "reasonable promptness". 42 U.S.C. § 1396a(a)(8). The second requires States to provide "medical assistance" that is not "less in amount,

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[1] In order to become certified to operate an ICF/MR, one must demonstrate a need for ICF/MR services in the community. Given that there are about 21 persons waiting for care in an ICF/MR, this requirement does not present a significant obstacle to opening a new ICF/MR in Colorado.

duration or scope than the medical assistance made available to any other such individual". 42 U.S.C. § 1396a(a)(10)(B)(i). In both cases, the statutes refer to medical "assistance" and not to medical "care" or medical "services".

The applicable statute defines "medical assistance" as "*payment* of part or all of the costs of" medical care and services. 42 U.S.C. § 1396d(a) (emphasis supplied). Thus, the plain meaning of the statutes upon which petitioners rely is that Colorado must *pay for* certain medical care and services promptly and even-handedly. Petitioners strain to find a statute or other authority saying that Colorado must itself provide medical services, but they fail.

Petitioners' principal argument is that Colorado has expressly promised to provide these services in its state plan. Pet. at 17-19. This argument is inaccurate and unpersuasive.

In order to participate in Medicaid, a State must submit a written plan setting out the terms and conditions of its medical assistance program. 42 U.S.C. § 1396a. These plans are submitted to the Centers for Medicare and Medicaid Services ("CMS") within the Department of Health and Human Services, the federal agency that administers the Medicaid program. In practice, CMS prescribes a lengthy series of forms that a State must complete in order to submit its state plan. These forms include pages titled "Amount, Duration and Scope of Medical and Remedial Care and Services Provided to the Categorically Needy". One of these pages lists ICF/MR services and ICF/MR services in a public

institution, with boxes next to the words "Provided," "Not Provided," "No Limitations," and "With Limitations". Colorado placed an "X" in the boxes next to the words "Provided" and "No Limitations". This form is reproduced in Appendix F to the Petition.

Petitioners urge that by checking these boxes Colorado has expressly promised that it will provide ICF/MR services. This is incorrect. The purpose of this page is to advise CMS of the amount, duration and scope of the services covered by Colorado's Medicaid plan. The form is not intended to provide information about who will provide the covered services. While the plan says ICF/MR services are provided, it does not say who will provide them. The form reads the same way for all covered services, such as physician services, pharmacy services, inpatient hospital services, and so forth, and yet Colorado provides only a tiny percentage of these services directly. In nearly all cases, the services are provided by private organizations, and Colorado pays for the services provided to eligible patients. Historically, the same was true for ICFs/MR; most ICFs/MR were operated by private organizations. Over time, both private organizations and Colorado reduced the number of ICF/MR beds they operated. This historical development does not change the nature of Colorado's obligation under the state plan. The plan permits Colorado to pay for ICF/MR services provided in a public institution, but it does not obligate Colorado to operate any particular size or number of public institutions.

The phrase "Without Limitations" in the state plan refers to limitations on payments. Colorado

imposes no annual or lifetime limit on the amount of ICF/MR services an individual can obtain. By contrast, Colorado has checked the box "With Limitations" for other services. For example, for inpatient psychiatric hospital services, the box "With Limitations" is checked because Colorado will pay for only 45 days of such care per year for each recipient. Pet. App. 13a-14a. In this context, the phrase in the state plan "Without Limitation" cannot be interpreted as a promise by Colorado to provide ICF/MR services.

Next, petitioners urge that 42 C.F.R. § 435.930 supports the view that States must provide medical care. In fact, the regulation supports exactly the opposite view. The rule says that States must furnish Medicaid "promptly" and "without delay" and continue to furnish Medicaid until the individual is found to be ineligible. § 435.930(a) and (b). The regulation goes on to say that States must make "arrangements to assist applicants ... to get emergency medical care". § 435.930(c). Thus, the rule expressly distinguishes between payment for services that a State must supply under subparagraphs (a) and (b), and medical services themselves (such as emergency services) that a State need NOT furnish but need only make arrangements to assist the applicant to obtain under subparagraph (c). This rule does nothing to advance petitioners' argument.

Petitioners also argue (Pet. at 20) that two subsections of 42 U.S.C. § 1396a(a) refer to "medical assistance" as if the term included actual services rather than payment for services. For example, § 1396a(a)(23) refers to "medical assistance (including drugs)" and § 1396a(a)(65) refers to "medical

assistance consisting of durable medical equipment". Read in context, neither of these subsections requires a State to provide services rather than payment. Subsection (65) requires the State to issue provider numbers to the organizations that provide durable medical equipment. Subsection (23) allows recipients to obtain drugs from a variety of provider types. Both of these subsections assume some organization other than the State will actually provide medical care and services. These subsections do not support petitioners' claim that the States must provide services.

Petitioners also urge (Pet. at 20) that the word "furnish" in § 1396a(a)(8) requires states to provide medical care. As noted above, however, the statute requires the States to furnish "medical assistance" with reasonable promptness and "medical assistance" is defined as payment, not services. 42 U.S.C. § 1396d(a). One can "furnish" payments as well as services. There is nothing about the word "furnish" that changes the express definition of "medical assistance", so this statute does not support petitioners' argument.

In sum, the court of appeals correctly held that there is nothing in the state plan or the applicable statutes or rules supporting petitioners' claim that States must provide medical care and services. *See* Pet. App. at 11a-12a, 16a.

II. There is no conflict in the lower courts on the question presented.

Petitioners urge that there is a conflict among the lower courts on the question presented. When the

cases are examined carefully, however, no conflict appears.

In this case, the Tenth Circuit held that a State can discharge its obligations under the federal Medicaid statutes by paying for medical care and services promptly and even- handedly. *See* Pet. App. at 16a. In order to be in conflict with this decision, another court would have to hold that a State must actually provide medical services and not just promise to pay for them. There are no such decisions.

In some cases, courts have ordered States to end waiting lists for services, but in these cases, there is no discussion of whether the services are unavailable because the State refused to pay for them or for some other reason. In other words, the question of whether a promise to pay was sufficient was not presented to or decided by these courts. Thus, the courts did not decide the issue presented here.

For example, in *Bryson v. Shumway,* 308 F.3d 79 (1st Cir. 2002), plaintiffs sought access to HCBS. The trial court ruled in favor of the plaintiffs and ordered Massachusetts to provide more HCBS. 398 F.3d at 81. On appeal, the First Circuit reversed and held that Massachusetts could place a cap on the number of people who received HCBS. 308 F. 3d at 87. The remaining issue was whether Massachusetts had provided even fewer services than allowed under the cap. Plaintiffs alleged that Massachusetts had "slots" available under the cap that had not been used, and the First Circuit remanded the case for further proceedings on this claim. 308 F.3d at 89-90. The plaintiffs did not argue that Massachusetts must directly provide the HCBS, and there was no

discussion of whether the slots were allegedly unfilled because Massachusetts was unwilling to pay for them or because there were no private organizations willing to provide them. In short, the First Circuit did not reach the question presented here.

The same is true for *Doe v. Chiles,* 136 F.3d 709 (11th Cir. 1998). In that case, plaintiffs sought access to ICFs/MR, and the Eleventh Circuit ordered Florida to provide this access. 136 F. 3d at 711-712, 721-723. The opinion, however, does not provide any information about why there was a delay in obtaining ICF/MR services. There may have been empty ICF/MR beds, and Florida may have been unwilling to pay for more ICF/MR services. The order did not discuss whether Florida could discharge its obligations by promising to pay for the services or whether Florida was required to provide the services. Again, the court did not reach the issue presented here.

Petitioners cite several district court cases for the proposition that States must provide medical services. Pet. at 23, n.12. As in *Bryson v. Shumway* and *Doe v. Chiles, supra,* most of these cases did not reach the question of whether a State must provide medical services. *See Equal Access for El Paso v. Hawkins*, 428 F. Supp.2d 585 (W.D. Tex. 2006), *Michelle P. ex rel. Diesonroth v. Holsinger*, 356 F. Supp.2d 763 (E.D. Ky 2005), *Martin v. Taft*, 222 F. Supp.2d 940 (S.D. Ohio 2002), *Antrican v. Buell*, 158 F. Supp.2d 663 (E.D. NC 2001), *Boulet v. Cellucci*, 107 F. Supp. 61 (D. Mass. 2000), *Sobky v. Smoley*, 855 F. Supp. 1123 (E.D. Cal. 1999), and *McMillan v. McCrimon*, 807 F. Supp.2d 475 (C.D. Ill. 1992). The

one case actually addressing the issue agrees with the Tenth Circuit's decision in this case. *See Clark v. Richman,* 339 F. Supp. 2d 631, 643 (M.D. Pa. 2004) (ruling "as a matter of law that the reasonable promptness provision does not afford plaintiffs the relief they seek because the provision requires the Commonwealth to provide timely medical assistance, i.e., financial assistance, and does not require the provision of actual services").

III. The federal agency with authority and experience in this area has never adopted Petitioners' interpretation of the Medicaid laws.

CMS is the federal agency charged with administering the Medicaid program. 42 C.F.R. § 430.10. CMS is well aware of the waiting list for residential DD services in Colorado and it has never taken any action suggesting that Colorado must provide services to end these lists. Resp. App. A-1. This Court should defer to CMS on this question.

As petitioners point out (Pet. at 12, n.9), Colorado is not unique in having a waiting list for residential DD services. According to petitioners, there are 22 active waiting list lawsuits around the county, and there are 75,228 persons waiting for such services. *Id.* CMS, however, has taken no action to sanction any State, to issue any rule or policy, or in any other fashion to express a position that States must provide medical services to end these waiting lists.

Indeed, at trial in this case, Colorado officials testified that the Colorado Medicaid program had been subjected to a variety of audits and reviews by CMS, and CMS had not only failed to object to the waiting lists for residential DD services, it had actually provided technical advice on better ways to manage the waiting lists. App. A-1.

As petitioners themselves argue (Pet at 22), in the complex and arcane area of Medicaid, CMS's interpretation of the applicable statutes is entitled to "substantial deference." *See also Atkins v. Rivera*, 477 U.S. 154, 162 (1986) (Medicaid regulation supported by plain language of statute and adopted pursuant to explicit grant of rulemaking authority "entitled to more than mere deference or weight" but "is controlling unless arbitrary, capricious, or manifestly contrary to the statute.") (internal quotations and citations omitted). That interpretation is contrary to Petitioners' argument, but consistent with the text of the relevant statutes and the decision of the courts that have reached the question, including the court below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 2007

APPENDIX

(Excerpts from Trial to Court – Day 2 and 3, Partial Transcript of Proceedings; original transcript pages appear as "**[Trial to Court – Day __, p. __]**")

[Trial to Court – Day 2, p. 59]

Kauffman - Direct

A Typically a state will ask for a waiver of statewideness when they don't plan on providing these waiver services throughout the entire state. For example, if you were not going to provide these waiver services in Mesa County, you would get a waiver of statewideness, and basically indicate that you were not going to provide services in Mesa County. In Colorado's case, CMS recommended back in 1993 that we ask for a waiver of statewideness because we don't operate our waiting list on a statewide basis. We don't have a statewide waiting list for these services. The services with waiting lists are dealt with at the local level, so each CCB has their own wait list, and, so, CMS recommended that we request that waiver.

Q Okay. On Page 4 of this exhibit, it's Bate stamped at the bottom, the lines for habilitation, specifically comprehensive habilitation services are checked; is that correct?

A That is correct.

Q And, where do we find more detail of what habilitation services are?

A If you go back to, I believe it's B-9, or stamped page 20?

Q Page 20?

A Yes.

Q Okay.

[Trial to Court – Day 3 (volume I), p. 41]

initially that the ICF was available to our daughter?

THE COURT: No. The purpose of the lawsuit is to direct that the State defendants make such a facility available.

THE WITNESS: Uh-huh.

THE COURT: Now, have you ever been to Ridge or Grand Junction?

THE WITNESS: Have we ever been what again?

THE COURT: Have you ever been to visit an ICF/MR?

THE WITNESS: No, sir, I have never visited one.

THE COURT: Do you realize it's an institution?

THE WITNESS: That's what I was told.

THE COURT: All right. And, is that what you want to have happen to your daughter now?

THE WITNESS: I don't want her, if you're asking me do I want her institutionalized--

THE COURT: Yes.

THE WITNESS: --in terms of what used to be considered an institution for the mentally retarded, no, I do not want that for my daughter. I want her in a situation where she's in an apartment type living situation, a group home living situation, where she can go out in the community and work safely, and return to her apartment safely, and participate in social functions. She is not severely mentally or physically handicapped.

[Trial to Court – Day 3 (volume I), p. 127]

think?

A No.

Q And, why is that?

A We were offered a slot at Good Shepard, at the home in Littleton, and my husband and I did visit the day program and the home, and we did not think it was suitable for Mandy.

MS. WYTIAS: No further questions.

THE COURT: When was that offer?

THE WITNESS: That was in December of 2003.

THE COURT: Thank you.

REDIRECT EXAMINATION

BY MR. SOLEM:

Q Why was that not suitable?

A The home had three male occupants, and Mandy would have been the only female, and the level of care was higher than she needed. She doesn't have physical disabilities, and as I recall, the three occupants of the group home did. It was just a higher level of care than she required.

Q Was it the situation in that particular home that you felt was unacceptable?

A Yes.

Q And, if those conditions were removed, would Good Shepard have been otherwise acceptable to you?

A Yes.

[Trial to Court – Day 3 (volume I), p. 152]

care?

A I believe she could benefit from it, and people of her category could benefit, and it would relieve the burden on families as well as the client themselves.

Q And, are you asking that she actually receive intermediate care facility services?

A I would highly recommend it, and I do hope that it will be considered.

MS. KNAPP: Thank you. Those are all my questions.

THE COURT: Are you speaking about a regional center?

THE WITNESS: That is correct, sir.

THE COURT: All right.

MS. WYTIAS: I think I just have one question, Your Honor.

THE COURT: You may.

CROSS-EXAMINATION

MS. WYTIAS:

Q Mr. G, so I'm just--I'm not completely clear about what kind of placement you would like for Kathy. Would you like her to be in one of the campus settings at the regional center, or

in a group home at the regional center if it was an ICF?

A Group home. I believe it would be more advantageous.

Q So, you're saying that you'd want her to be either at Wheat Ridge or Grand Junction in a group home off campus,

[Trial to Court – Day 3 (volume I), p. 153]

or on campus? Do you know the difference?

A Yeah, you explained the difference is on campus or off campus. Would I prefer one or the other?

Q Yes.

A would prefer her in a small setting off campus.

Q Off campus?

A Yes.

Q Have you ever been to one of the off campus regional center homes?

A I have.

Q In Wheat Ridge or in Grand Junction?

A In Denver.

Q Okay. And, so, you'd like one that currently

exists through the regional center at Wheat Ridge?

A I most definitely would.

MS. WYTIAS: No further questions.

THE COURT: Anything else of this witness? All right, you may step down, Mr. G.

THE WITNESS: Thank you, sir.

THE COURT: We'll take a 15 minute recess.

(3:53 p.m. - Recess accordingly.)

(At 4:11 p.m. on June 3, 2004, with counsel for the parties present, the following proceedings were had:)

THE COURT: Please be seated.

Next witness? Our next witness?

[Trial to Court – Day 3 (volume I), p. 176]

A She has no sequencing and time management. She would need anxiety monitoring, her seizure disorder would need to be monitored, voc. rehab, those type of vocational services, as well as social and emotional.

Q Would you accept services in a group home?

A Yes.

Q What kind of a group home?

A I would like ideally to have her in a small setting, a supervised structured small setting, that would provide the services that she needed in a safe area.

Q Would you accept services in an ICF/MR?

A Yes.

Q And, what kind of a placement would be acceptable in that regard?

A I really can't see her needing to be like in a hospital type setting. I would like to have it in a community based home.

Q Would you accept services in a regional center, from what your understanding of what a regional center is?

A I think that would be a little too restrictive for her, and wouldn't allow her to really grow.

Q And, the most ideal situation for your daughter would be?

A I would say a small group home.

MR. SOLEM: No further questions.

family seeking ICF/MR services. How can I pursue that?" I also made him aware that I thought a lawsuit might be involved with it. And he said I should talk to the Medicaid Director, Richard Allen.

Q Did you contact Mr. Allen?

A I did. I contacted Richard Allen and shared with him that I had a family that was seeking ICF/MR services, and also made him aware that I thought there might be a lawsuit involved with this, and he shared that he would get back to me with information about the situation.

Q Did he ever get back to you?

A No, he has not.

Q Did you draw any inference from that?

A I think that, in general, those of us who operate in the field believe that that has not been a option that's available; that it's an older model that most folks I think associated with it have been moving away from, has a lot of problems with it. And I also think it's not something that anybody wanted to encourage or that was readily available or even--I just--from my experience it has not been available.

MR. WESTFALL: I have no further questions.

THE COURT: Ms. Knapp?

MS. KNAPP: Thank you, Your Honor.

Hello, Dr. Hogling?